BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether in this action under Section 14(a) of the Securities Exchange Act of 1934 the proxy statement's misstatements submitted to the jury were so obviously unimportant or devoid of factual content that no reasonable stockholder could have regarded them as untrue statements of material fact.

2. Whether this Court should consider the causation questions raised by petitioners despite the fact that petitioners failed to raise these questions in either court below.

3. Whether minority stockholders ought to be precluded from bringing an action for damages under Section 14(a) against the issuer of a misleading proxy statement even though solicitation of minority stockholder votes was necessary to accomplish the transaction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT	1
SUMMARY OF ARGUMENT	7
ARGUMENT	12
I. PETITIONERS CANNOT SATISFY THEIR BURDEN UNDER *TSC INDUSTRIES v. NORTHWAY, INC.* OF SHOWING THAT THE MISSTATEMENTS WERE IMMATERIAL AS A MATTER OF LAW	12
A. The Factual Representation That "The Merger Has Been Approved By The Board Of Directors Because It Provides An Opportunity For The Bank's Public Shareholders To Achieve A High Value For Their Shares" Was Misleading	13
B. The Factual Representation That KBW Independently Passed On The Fairness Of The Merger To Minority Stockholders Was Misleading	22
C. The Proxy Statement Did Not Disclose All Material Facts With Respect To The Directors' Recommendation And KBW's Role	26
II. THIS COURT SHOULD NOT CONSIDER THE CAUSATION ISSUES ASSERTED BY PETITIONERS BECAUSE THOSE ISSUES WERE WAIVED IN THE COURTS BELOW AND THE COURT OF APPEALS DID NOT DECIDE THEM	29
III. THE JURY'S VERDICT THAT THE DECEPTIVE PROXY SOLICITATION CAUSED RESPONDENTS' INJURY SHOULD BE AFFIRMED BECAUSE THE ISSUE WAS SUBMITTED TO THE JURY ON CORRECT INSTRUCTIONS AND THE EVIDENCE SUPPORTED THE VERDICT	33

TABLE OF CONTENTS—Continued

	Page
A. The Court Should Reject Petitioners' Preclusive Causation Argument	33
B. The Causation Issue Was Submitted To The Jury On Proper Instructions In Which All Of The Parties Concurred	38
C. The Evidence Of Causation Supported The Verdict	43
CONCLUSION	48

TABLE OF AUTHORITIES

CASES:	Page
Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988)	16, 37, 39
Berg v. *First American Bankshares, Inc.*, 796 F.2d 489 (D.C. Cir. 1986)	21
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	32
Board of Trustees v. *Fox*, 109 S. Ct. 3028 (1989)	16
Borden v. *Sinskey*, 530 F.2d 478 (3d Cir. 1976)	44
Bowen v. *American Hospital Association*, 476 U.S. 610 (1986)	32
Central Hudson Gas & Electric Corp. v. *Public Service Commission*, 447 U.S. 557 (1980)	16
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	32
Chris-Craft Industries v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973)	12
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	32
City of St. Louis v. *Praprotnik*, 485 U.S. 112 (1988)	32
City of Springfield v. *Kibbe*, 480 U.S. 257 (1987)	30, 32
Cowin v. *Bresler*, 741 F.2d 410 (D.C. Cir. 1984)	29, 36, 37
Dasho v. *Susquehanna Corp.*, 461 F.2d 11 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972)	44, 47
Day v. *Avery*, 548 F.2d 1018 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 908 (1977)	28
Efros v. *Nationwide Corp.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,077 (S.D. Ohio Jan. 17, 1983)	35
Eisenberg v. *Gagnon*, 766 F.2d 770 (3d Cir.), *cert. denied*, 474 U.S. 946 (1985)	26
First Virginia Bankshares v. *Benson*, 559 F.2d 1307 (5th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978)	27
Fradkin v. *Ernst*, 571 F. Supp. 829 (N.D. Ohio 1983)	14
Franchard Corp., 42 S.E.C. 163 (1964)	20
Galloway v. *United States*, 319 U.S. 372 (1943)	6, 7

TABLE OF AUTHORITIES—Continued

Page

Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949) 6
Healy v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641 (3d Cir. 1980) 42
Herb v. *Pitcairn*, 324 U.S. 117 (1945) 32
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983) 16
Herskowitz v. *Nutri/System, Inc.*, 857 F.2d 179 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1315 (1989) 13
Howing Co. v. *Nationwide Corp.*, 826 F.2d 1470 (6th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988) 27
Interstate Circuit, Inc. v. *United States*, 306 U.S. 208 (1939) 46
J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 20, 21
Kessler v. *Commonwealth Doctors' Hospital, Inc.*, 212 Va. 497, 185 S.E.2d 43 (1971) 44
Laurenzano v. *Einbender*, 264 F. Supp. 356 (E.D.N.Y. 1966) 34, 37
Lavender v. *Kurn*, 327 U.S. 645 (1946) 11, 43, 47
Lynch v. *Fulks*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,831 (D. Kan. Dec. 12, 1980) 29
Madison Consultants v. *FDIC*, 710 F.2d 57 (2d Cir. 1983) 41
McMahan & Co. v. *Wherehouse Entertainment, Inc.*, 900 F.2d 576 (2d Cir. 1990) 22
Meriwether v. *Coughlin*, 879 F.2d 1037 (2d Cir. 1989) 43
Merrick v. *Farmers Insurance Group*, 892 F.2d 1434 (9th Cir. 1990) 41
Meyers Parking System, Inc., Exchange Act Release No. 26,069, 41 SEC Docket 1061 (Sept. 12, 1988) 27
Milkovich v. *Lorain Journal Co.*, 110 S. Ct. 2695 (1990) 7, 12, 14, 15

TABLE OF AUTHORITIES—Continued

Page

Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) ..... *passim*
Oklahoma City v. *Tuttle*, 471 U.S. 808 (1985) 30, 32
Osterneck v. *E.T. Barwick Industries*, 825 F.2d 1521 (11th Cir. 1987), *aff'd*, 489 U.S. 169 (1989) 31
Piper v. *Chris-Craft Industries*, 430 U.S. 1 (1977) 36
Robbins v. *Banner Industries*, [1967-1969 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,309 (S.D.N.Y. Nov. 27, 1968) 35
Rowland v. *Kable*, 174 Va. 343, 6 S.E.2d 633 (1940) 44
Santa Fe Industries v. *Green*, 430 U.S. 462 (1977) 20, 41
Schlick v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975) 37, 38
SEC v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963) 16
SEC v. *Falstaff Brewing Corp.*, 629 F.2d 62 (D.C. Cir.), *cert. denied*, 449 U.S. 1012 (1980) 14, 16, 28
Swanson v. *American Consumer Industries*, 415 F.2d 1326 (7th Cir. 1969) 37
Tanzer v. *Haynie*, 405 F. Supp. 650 (S.D.N.Y. 1976) 27
TSC Industries v. *Northway, Inc.*, 426 U.S. 438 (1976) 7, 12, 22, 28
United States v. *Arthur Young & Co.*, 465 U.S. 805 (1984) 22
United States v. *Atkinson*, 297 U.S. 157 (1936) 30
United States v. *Park*, 421 U.S. 658 (1975) 40
Van Buskirk v. *Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985) 41
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 16
Vulcan Metals Co. v. *Simmons Manufacturing Co.*, 248 F. 853 (2d Cir.), *cert. denied*, 247 U.S. 507 (1918) 15

TABLE OF AUTHORITIES—Continued

STATUTES, RULES, AND REGULATIONS: Page

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*
- Section 10(b), 15 U.S.C. § 78j(b) 37
- Section 12, 15 U.S.C. § 78*l* 20, 37
- Section 13(e)(1), 15 U.S.C. § 78m(e)(1) 12
- Section 14(a), 15 U.S.C. § 78n(a) ..... *passim*
- Section 14(e), 15 U.S.C. § 78n(e) 36

Fed. R. Civ. P. 30(b)(6) 23
Fed. R. Civ. P. 50 30
Fed. R. Civ. P. 51 ..... 31, 39
Supreme Court Rule 15.1 30
Va. Code Ann. § 13.1-691 ..... 3, 11, 43
Va. Code Ann. § 13.1-718 ..... 2, 3
12 C.F.R. § 335.206(a) 26
12 C.F.R. § 335.212, Item 14(a) 12
12 C.F.R. § 335.409 26
17 C.F.R. § 240.10b-5 ..... 36, 40
17 C.F.R. § 240.13e-100 ..... 26, 27
17 C.F.R. § 240.14a-9 26
45 Fed. Reg. 62,481-62,482 (1980) 26
46 Fed. Reg. 25,205-25,206 (1981) 26

LEGISLATIVE HISTORY:

H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934) 37
S. Rep. No. 1455, 73d Cong., 2d Sess. (1934) 37

OTHER AUTHORITIES:

American Law Institute, *Federal Securities Code* (1980) 10, 39, 42
Booth, *Management Buyouts, Shareholder Welfare, and the Limits of Fiduciary Duty*, 60 N.Y.U. L. Rev. 630 (1985) 35
Charles L. Ephraim, SEC No-Action Letter (Sept. 30, 1987) 27
W. Fletcher, *Cyclopedia of the Law of Private Corporations* (1990) 14, 44
F. Harper, F. James & O. Gray, *The Law of Torts* (2d ed. 1986) 15

TABLE OF AUTHORITIES—Continued

Page

T. Hazen, *The Law of Securities Regulation* (2d ed. 1990) 36
Hazen, *Corporate Chartering and the Securities Markets: Shareholder Suffrage, Corporate Responsibility and Managerial Accountability*, 1978 Wis. L. Rev. 391 (1978) 20, 21, 37
Restatement (Second) of Torts (1976) 15, 28
Seligman, *The Historical Need For a Mandatory Corporate Disclosure System*, 9 J. Corp. L. 1 (1983) 21
C. Wright & A. Miller, *Federal Practice and Procedure* 30, 43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1448

VIRGINIA BANKSHARES, INC., *et al.*,
Petitioners,

v.

LEWIS I. SANDBERG,
Respondent.

FIRST AMERICAN BANKSHARES, INC., *et al.*,
Petitioners,

v.

PAUL H. WEINSTEIN, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENTS

COUNTERSTATEMENT

Prior to the merger out of which this case arises, respondents were stockholders of First American Bank of Virginia ("the Bank"), the dominant bank in northern Virginia, which had just enjoyed its third consecutive year of record earnings. Fourth Circuit Joint Appendix ("Fourth Circuit JA") 718. As the jury specifically

found, respondents' stock was worth $60 per share. JA 527. *See* Petition Appendix ("Pet. App.") 19a. Petitioner First American Bankshares, Inc. ("FABI"), which owned 85% of the Bank's stock,[1] obtained the needed approval of minority stockholders to the taking of their stock for only $42 per share by means of a proxy statement that, as the jury found, falsely represented that the Bank's board had approved the merger because it provided minority stockholders an opportunity to achieve a high value for their shares and that an independent investment banker had passed on the fairness of the merger to minority stockholders.

FABI's actions arose out of a report by its Treasurer showing that acquisition of the minority's stock should be a "top priority" because acquiring the minority stock would significantly increase FABI's earnings—so much so as to be profitable, even in the first year, at a price greater than $60 per share. JA 437-439.[2]

FABI promptly decided to acquire the minority's stock for $42 per share by means of a freeze-out merger. JA 186-191. FABI's ownership of 85% of the Bank's stock provided the votes necessary to give itself stockholder approval of the $42 price it wanted to pay. Va. Code Ann. § 13.1-718(B), (E). Nonetheless, FABI could not force the minority to give up its stock at $42 per share unless the Bank's board of directors validly approved the

[1] FABI owned its stock through a wholly-owned subsidiary, Virginia Bankshares, Inc. The two are referred to collectively as FABI.

[2] At trial, FABI attacked its own Treasurer, the author of the study on which the merger was based, in an effort to show that his study proved only that FABI would increase its net income by $299,000 a year by investing $45 million. *See, e.g.*, JA 349. FABI's Treasurer nonetheless explained that the $299,000 a year return was based on an assumption that the $45 million was borrowed and all of the interest was paid. JA 152-154. He pointed out that his study showed that if FABI invested its own funds, the return would be $3.7 million (or 8.3%) in the first year. JA 155. In fact, FABI earned 10% in the first year. JA 393.

merger, recommended it to stockholders, and waived its right not to consummate the merger despite stockholder approval. Va. Code Ann. § 13.1-718(B)(1), (J). FABI's success with the Bank's board was summarized in the holding of the court of appeals (not under review here): "The evidence fully supports a view that the directors exercised no independent judgment whatsoever with regard to the interests of the minority stockholders," but "merely rubber-stamped everything placed before them by [FABI]." Pet. App. 19a.[3]

FABI's success in neutralizing the Bank's board was facilitated by its Executive Vice President Jack Beddow, who was both the FABI official primarily responsible for accomplishing the freeze-out and a director of the Bank. JA 186. Beddow, however, was a double-edged sword. Because of Beddow's divided loyalties, his actions as a Bank director made the merger voidable, or subject to suit for restitution of the value of the stock taken in the merger, unless the actions of the Bank's board were approved by the minority stockholders. Petitioners so recognized by seeking and obtaining an instruction in the district court that the effect of Beddow's conflict could be avoided pursuant to Virginia's director conflict of interest statute, Va. Code Ann. § 13.1-691, if "the *minority stockholders* of the First American Bank * * * *approved* of the merger * * *." JA 431 (emphasis added).

Minority stockholder approval was also necessary to avoid harm to the Bank from the adverse public reaction FABI anticipated if the minority stockholders realized

[3] That same conclusion also was reached by District Judge Albert V. Bryan, Jr., who heard all the evidence presented to the jury and stated, in his order denying petitioners' post-trial motions, that the evidence showed that "the directors didn't make any judgment on [the merger]. It was rubber-stamped right all the way through." JA 531. Thus, the jury, the trial judge, and the court of appeals all rejected the view of the evidence that now appears at pages 6 to 8 of petitioners' brief in support of the tired contention that the board approved the merger because it was fair.

that they were being compelled to give up their stock at an unfair price. *See, e.g.*, JA 454 and *infra* p. 45. FABI thus decided, and represented to the Bank's chairman, that it was necessary that the board go to stockholders "for their approval as well." JA 202; *see infra* pp. 45-46.

To induce the minority stockholders to give their approval to the taking of their $60 stock for $42, FABI, the buyer, drafted proxy soliciting materials to be issued to the Bank's stockholders in the name of the Bank's directors. JA 241, 318, 467 *et seq.* These materials "urg[ed]" minority stockholders to grant proxies for votes in favor of the merger, Pet. App. 36a, and in support of that request, represented that (1) the Bank's board had approved the merger "because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares," Pet. App. 53a; and (2) an investment banker, Keefe, Bruyette & Woods ("KBW"), had originated the $42 price on the basis of its independent valuation of the stock and had opined that the price was fair to minority stockholders. Pet. App. 38a, 54a.

These representations were designed to make the freeze-out of the stockholders of the Bank look different from FABI's failed effort, a year earlier, to freeze out the minority stockholders of its Maryland subsidiary. *See* JA 319. That effort had been blocked when an independent investment banker hired by the subsidiary's board concluded that FABI's price was inadequate. JA 297. The instant proxy statement thus urged stockholders to grant their proxies in favor of the merger because, this time, an independent investment banker originated the $42 price and the Bank's board had approved the merger because it offered a high value to minority stockholders.[4]

[4] The board of the Maryland subsidiary refused to approve the merger. JA 297. The Virginia board's approval of the merger was facilitated by FABI's representation that the transaction would go to the public stockholders for their approval as well.

Those representations were entirely false, and the jury so found. In fact, the Bank's board neither saw nor approved the proxy statement before it was disseminated in its name to the Bank's stockholders. JA 226-227. Specifically, the Bank's board did not see or approve the representation as to its reason for approving the merger, and did not determine the value of the minority stock at all, or approve the merger because it provided minority stockholders an opportunity to achieve a high value for their shares. *See infra* pp. 16-18. To the contrary, directors admitted at trial that the board approved the merger because it believed it had no other choice and would be replaced if it did not. *See, e.g.*, JA 274, 281-282 and *infra* p. 18. Moreover, KBW had not performed an independent valuation of the stock, or opined that the $42 price was fair to minority stockholders. Instead, it simply agreed to recommend the price that FABI disclosed to KBW as the price it wanted to pay. JA 259-260, 356-357, despite FABI's knowledge that doing so would compromise KBW's independence. JA 173-174; *see infra* pp. 23-26.

The proxy statement succeeded in convincing minority shareholders to approve the merger. As petitioners put it in their brief, minority stockholders were "delighted" to approve the merger, thereby authorizing FABI to pay them $30.8 million for stock worth more than $44 million. Brief for the Petitioners ("Pet. Br.") 49.

Following consummation of the merger, respondent Sandberg commenced this action in the United States District Court for the Eastern District of Virginia. After a three-day trial, the jury returned a verdict for $18 per share against FABI and the directors pursuant to instructions requiring findings that the proxy statement contained materially false or misleading statements of fact, JA 420, 422, was an essential link in the accomplishment of the merger, JA 426, and proximately caused the injury sustained by minority stockholders by taking their

stock for $42 per share. JA 424.[3] The *Sandberg* judgment was given collateral estoppel effect in favor of the other respondents, who had filed a separate action after petitioners successfully opposed both class certification and attempts to intervene in the *Sandberg* action. *See* Pet. App. 28a-29a.

On appeal, the Fourth Circuit affirmed the judgment for respondents in all respects, reversed the district court's denial of class certification, and remanded for entry of an order certifying a class. This Court granted certiorari to review two questions of law.

This Court's review of those questions is governed by the fundamental rules that this Court does not sit to review concurrent findings of fact by two courts below. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-275 (1949), and, in any event, that the evidence and inferences must be viewed in the light most favorable to the jury's verdict. *Galloway* v. *United States*, 319 U.S. 372 (1943). Petitioners' arguments, however, are based on factual assertions that were rejected by the jury's verdict for respondents. For example:

• Petitioners assert that the stock taken pursuant to the deceptive proxy statement was worth no more than the $32 per share "market price" and thus the taking of their stock for $42 was "beneficial." *See, e.g.*, Pet. Br. 1-4, 49-50. Petitioners ignore the jury's specific finding that the minority stock was worth $60 per share, JA 527, and the court of appeals' specific rejection of the valuation arguments advanced here. Pet. App. 19a-21a. Petitioners also ignore the evidence supporting the jury's verdict, which included the concession of petitioners' own expert that the "market price" was derived from a market that was "thin," "not open," and one in which "the parent set the price," JA 347, 354, 247-249, 452, as well as the comprehensive testimony of respondents' expert. *See* Pet. App. 19a-21a.

[3] The verdict against petitioners was based on § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). The jury also returned an alternate verdict in the same amount against the directors on a claim for breach of fiduciary duty, not under review here. JA 527.

• Petitioners assert that the $42 merger price was originated by KBW, Pet. Br. 5, but the evidence showed that the $42 price was parrotted back—not originated—by KBW. When FABI first contacted KBW, it disclosed the price it wanted to pay, knowing that doing so would compromise KBW's independence. JA 173-174, 259-260.

• Petitioners contend that the Bank's board approved the merger because it was fair to minority stockholders. Pet. Br. 6-8. But the jury found that the Bank's board "exercised no independent judgment whatsoever with regard to the interests of the minority stockholders" and simply "rubber-stamped everything placed before them by [FABI]." Pet. App. 19a.

Petitioners' effort to reargue the facts disregards the standard of review of jury verdicts, *see Galloway* v. *United States*, *supra*, directly contradicts petitioners' representation to this Court in support of the petition for certiorari, Reply Brief for Petitioners 1, and necessitates a detailed recitation of the facts in connection with related legal arguments below.

SUMMARY OF ARGUMENT

I. The jury's verdict that the representations at issue were misrepresentations of material fact cannot be overturned unless petitioners show that, as a matter of law, the misstatements were so obviously unimportant or so devoid of factual content that no reasonable stockholder could have regarded them as untrue statements of material fact. *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438, 450 (1976). *See also Milkovich* v. *Lorain Journal Co.*, 110 S. Ct. 2695, 58 U.S.L.W. 4846, 4851 (1990). As shown in the Brief for the Securities and Exchange Com-

mission and the Federal Deposit Insurance Corporation as *Amicus Curiae* ("Government Brief" or "GB"), the misstatements relate to matters that are highly material to investors, and were plainly matters of fact.

The proxy statement flatly represented as fact that "[t]he Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares." Pet. App. 53a. The jury was instructed to consider whether this statement "was false or misleading, because the claimed high values for the shares was not the reason for [the board's] approval[.]" JA 421. The objective evidence—including the pertinent minutes, contemporaneous notes, and testimony by directors as to actions in the boardroom—supported the jury's verdict that the representation in the proxy statement was contrary to the objective facts. Liability was not imposed on petitioners for failure to discharge any affirmative duty to disclose a subjective motivation, but for falsely asserting that the board had made a determination it never made.

The other pertinent language represented that KBW was "independent," Pet. App. 38a, had given its "opinion as to the value to be ascribed" to the minority stock, *id.* at 54a, and had "pass[ed] on the fairness of the [m]erger" to minority stockholders. *Id.* at 38a. The jury was asked to consider whether the proxy statement falsely represented that KBW "was independent and had passed on the fairness of the merger." JA 422. The evidence supported the jury in finding that the representations as to what KBW did were untrue statements of material fact because KBW did not perform an independent analysis of the value of the stock and did not pass on the fairness of the merger to minority stockholders.

The views of the government agencies responsible for enforcing the securities laws that these issues were properly submitted to the jury weigh heavily in favor of affirmance. *See* GB 18 & n.27; 21 & n.33.

II. This Court should not consider the causation arguments asserted by petitioners because those arguments were not preserved in either of the courts below, and were not decided by the court of appeals. It would be unfair to respondents, and contrary to this Court's policy against reversing a jury's verdict on the basis of arguments not presented to the district court, to permit petitioners to seek reversal of the judgment on the ground that a showing of causation is precluded, as a matter of law, when a stockholder owns sufficient stock to grant itself the margin of approval normally required with respect to a particular transaction. Petitioners were asking the jury in this very case to find that minority stockholder approval of the merger eliminated the otherwise paralyzing effects of a director conflict of interest. Thus, petitioners were in no position to ask the jury to find that the votes they urgently solicited were unnecessary.

Nor was the argument made in the court of appeals, and the court of appeals was plainly not passing on it when it noted petitioners' concession "that the proxy statement was, under Virginia law, an essential link for accomplishing the merger." Pet. App. 13a n.1. Moreover, petitioners did not argue to the court of appeals, nor did the court of appeals decide, any question as to the correctness of the district court's causation instructions or the sufficiency of respondents' proof of causation.

III. Petitioners' argument that causation can never be shown when a stockholder has sufficient votes to grant itself the margin of approval normally required for a transaction should not be accepted because, as shown in the Government's Brief, there are a variety of circumstances in which injury within the scope of Section 14(a) flows directly from a deceptive proxy statement, even though a single stockholder owns sufficient stock to grant itself the margin of approval normally required for the transaction.

The error of petitioners' position is particularly egregious in situations, like this one, where, because of the circumstances of the particular case, minority stockholder approval is necessary to accomplish the transaction. For example, the votes of minority stockholders may be necessary, as they were here, to ratify action by the board of directors that is voidable under state law because a conflict of interest infects the action of the board. Similarly, minority stockholders' injury may, as here, flow directly from the use of a deceptive proxy statement where a controlling stockholder determines that it will not compel a freeze-out merger unless it is approved by minority stockholders. In such circumstances, the votes of a majority of the minority stockholders are necessary to accomplish the transaction and the proxy solicitation is thus just as necessary as was the solicitation in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 379 (1970).

The district court's causation instructions correctly submitted the issue of causation to the jury. At the request of all parties, the district court gave a proximate cause instruction substantially the same as that set forth in the American Law Institute's *Federal Securities Code* for civil actions based on proxy fraud. That instruction required the jury to find that petitioners' conduct with respect to the deceptive proxy statement was a substantial factor in causing respondents' injury and that the injury was a direct result or reasonably probable consequence of petitioners' conduct. The district court gave further instructions, with the concurrence of all parties, that (1) the plaintiff was not required to prove subjective reliance on the deceptive proxy solicitation if she proved that the proxy solicitation was an essential link in accomplishing the merger; and (2) the jury could find that the proxy solicitation was an essential link if it was necessary for the Bank to solicit proxies from minority stockholders.

Finally, the evidence of causation—the sufficiency of which petitioners never challenged in the courts below—amply supported the jury in finding that, in the particular circumstances of this case, minority stockholder approval was necessary to accomplishing the transaction. Petitioners can overturn the jury verdict only by showing that it had no evidentiary basis. *Lavender* v. *Kurn*, 327 U.S. 645 (1946). Such a showing cannot be made here.

The evidence showed that minority stockholder approval was necessary, both to ratify the tainted action of the board, and to comply with a condition established by FABI. Unless ratified by a majority of the minority stockholders, the merger could be undone, either at the suit of minority stockholders without the requirement of proof of injury or by suits for restitution of the value of the stock taken. Petitioners themselves asked the jury to find that the effect of the otherwise paralyzing conflict of interest could be removed as an obstacle to effective consummation of the merger if "the *minority stockholders* of the First American Bank * * * *approved* of the merger * * *." JA 431 (emphasis added). *See* Va. Code Ann. § 13.1-691. The evidence also showed that, because FABI was not willing to suffer the adverse business consequences of taking the minority's stock against its will, FABI decided, and informed the Bank's chairman, that minority stockholder approval was a condition of the merger. Petitioners neither presented any evidence—nor argued—to the jury that the minority shareholder approval they urgently solicited was unnecessary.

Considered in the terminology petitioners prefer, petitioners' solicitation of minority stockholder approval by means of a materially deceptive proxy statement proximately caused respondents' loss of available means of self-protection. Minority stockholder approval denied respondents the swift, sure and simple remedy of rescission of the merger or restitution of the fair value of their stock to which they were entitled in the absence of such approval. Minority stockholder approval also deprived re-

spondents of intra-corporate bars to consummation of the merger, which had been effective to block a similar transaction a year earlier.

ARGUMENT

I. PETITIONERS CANNOT SATISFY THEIR BURDEN UNDER *TSC INDUSTRIES* v. *NORTHWAY, INC.* OF SHOWING THAT THE MISSTATEMENTS WERE IMMATERIAL AS A MATTER OF LAW

The jury's verdict cannot be overturned unless petitioners show that, as a matter of law, the misstatements were so obviously unimportant or devoid of fact that no reasonable stockholder could have regarded them as untrue statements of material fact. *TSC Industries*, 426 U.S. at 4502. *See also Milkovich* v. *Lorain Journal Co.*, 110 S. Ct. at ——, 58 U.S.L.W. at 4851.

As shown in detail in the Government's Brief, the two misstatements at issue here were highly significant to stockholders. A board's statement of its reason with respect to a fundamental corporate change is an important representation, particularly where the reasons relate to a determination of value, a matter as to which the board has superior knowledge. *See Chris-Craft Industries* v. *Piper Aircraft Corp.*, 480 F.2d 341, 364-365 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).[6] A representation to minority stockholders that an investment banker's independent analysis supports an opinion by the banker that the transaction is fair to minority stockholders is a significant factor in a minority stockholder's analysis of the fairness of the price. *Herskowitz* v. *Nutri/System, Inc.*, 857 F.2d 179, 184 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1315 (1989). Petitioners' contention that these matters have no significance to stockholders is belied by the extraordinary efforts to which FABI went to deceive minority stockholders about them.

[6] Petitioners seem to argue that a statement cannot be a material fact, rather than mere subjective opinion, unless it is specifically identified in the line item disclosure requirements of the pertinent proxy regulation. Pet. Br. 21. This argument is not only flatly erroneous; it trips over itself: as the Government's Brief points out, Item 14(a) of the pertinent FDIC regulation, 12 C.F.R. § 335.212 Item 14(a), required disclosure of the reasons for the merger. GB 10. *See also* Section 13(e)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(1) (authorizing SEC and FDIC to require disclosure of reason for going-private transaction). This disclosure, of course, must be truthful.

Affirmance of the judgment is required by application of well-established principles and requires no "expansion" of existing law. On the contrary, acceptance of petitioners' argument would gut existing disclosure requirements. If the factual representations at issue here can be characterized as no more than subjective opinion as a matter of law, the Court will have created an exception that swallows the rule and immunizes a vast category of highly significant representations from *both* public and private enforcement.

A. The Factual Representation That "The Merger Has Been Approved By The Board Of Directors Because It Provides An Opportunity For The Bank's Public Shareholders To Achieve A High Value For Their Shares" Was Misleading

The above-quoted statement was a plain, old-fashioned statement of fact, the truth of which was readily capable of proof or disproof. The proxy statement flatly asserted that the Bank's board had approved the merger because it provided public stockholders a high value for their shares. The board, in fact, never made such a determination, and the jury so found. In arguing that the representation is "subjective opinion," Pet. Br. i, 15, 16, 28, petitioners ignore the actual language of the proxy statement and base their argument on the repeated assertion that the representation was simply that the merger was "fair." *See, e.g.*, Pet. Br. 20. On its face, however, the statement submitted to the jury refers to an objective

event—formal action by the board to approve the merger because it offered minority stockholders a high value.[7]

Members of a board of directors "can act as a board only when assembled as a board, and by deliberate and concerted action dispose of the issue under consideration." 2 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 392 (1990).[8] Thus, a representation of board action warrants a reasonable investor to believe that such collective action—an objective event—took place. *See SEC* v. *Falstaff Brewing Corp.*, 629 F.2d 62, 75 (D.C. Cir.), *cert. denied*, 449 U.S. 1012 (1980); *Fradkin* v. *Ernst*, 571 F. Supp. 829, 846 (N.D. Ohio 1983). It is plainly a "fact" whether the board of directors actually approved a transaction *for the reason stated* in the proxy materials.[9]

Even where a representation contains some element of opinion, "expressions of 'opinion' may often imply an assertion of objective fact"—including the fact that the speaker actually holds the opinion expressed. *Milkovich*

[7] Thus, petitioners' reference to 11 dictionary definitions of "fair," Pet. Br. 22 n.15, is beside the point.

[8] The reason for the rule is that stockholders have a right to expect that board action be based on distillation of a collective judgment. *See* W. Fletcher, *supra*.

[9] Contrary to petitioners' contention, this is not a case in which the jury was permitted to hold the directors liable because it disagreed with the directors' view expressed in the proxy statement that the price offered for the shares was a "high value." Nor is the issue presented whether a representation that a price is "fair" can be attacked as false or misleading. The jury here was not instructed to consider whether "the statement that the directors recommended the merger as 'fair' * * * was false * * *." Pet. Br. 20. The issue presented to the jury was whether the picture painted to the shareholders—that the transaction was approved because it offered shareholders a "high value"—was false "because the claimed high values for the shares was not the reason for [the directors'] approval[.]" JA 421. The court of appeals expressly sustained liability on that basis. Pet. App. 15a-16a.

v. *Lorain Journal Co.*, 110 S. Ct. at —— n.7, 58 U.S.L.W. at 4751 n.7 ("[T]he statement, 'I think Jones lied,' may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied"). The same principle applies in determining whether the antifraud rules of the securities law prohibit a particular misleading statement. When directors express their reasons for corporate action, shareholders naturally assume that the directors acted for the reasons stated. When they have not, the disclosure is misleading as to a material fact.

The common law has long recognized that the expression of an opinion that the speaker does not in fact hold may support an action for deceit, particularly when the speaker has superior access to information or stands in a fiduciary or trust relationship to the deceived party.[10] Directors, of course, stand in such a relationship to shareholders. Shareholders are plainly entitled to view judgments expressed in a proxy statement as accurately re-

[10] *See Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir.) (L. Hand, J.) ("[T]he expression of an opinion is the assertion of a belief, and any rule which condones the expression of a consciously false opinion condones a consciously false statement of fact."), *cert. denied*, 247 U.S. 507 (1918); Restatement (Second) of Torts, § 525 (1976), comment d ("[s]trictly speaking, 'fact' includes not only the existence of a tangible thing or the happening of a particular event * * *, but also the state of mind, such as the entertaining of an intention or the holding of an opinion * * *"), and comment c ("a statement that a particular person * * * is of a particular opinion * * * is a misrepresentation if the person in question does not hold the opinion"); *id.* at § 542(b) (recipient of an opinion may be justified in relying on it if the fact to which the opinion relates is material and the speaker "stands in a fiduciary or other similar relation of trust and confidence to the recipient"); *see also* 2 F. Harper, F. James & O. Gray, *The Law of Torts* § 7.8, at 425-431 (2d ed. 1986) (noting that an opinion reflects a fact—the speaker's state of mind—and discussing factors that may expose the speaker to liability for misrepresenting his opinion, including the relationship between the parties and the information implicitly possessed by the speaker).

flecting the directors' views and resting on an investigation adequate to justify holding those views. *Cf. SEC* v. *Falstaff Brewing Corp., supra.* Given this common law background, the federal securities laws should not be read more restrictively, especially because they were intended to improve the protections afforded to investors. *Cf. Basic, Inc. v. Levinson*, 485 U.S. 224, 244 n.22 (1988); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 388-389 (1983); *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 194-195 (1963).[11]

The evidence showed the inconsistency between the objective facts and the representation of those facts in the proxy statement, and fully supported the jury's verdict that the representation was a materially misleading statement of fact:

1. The language at issue was drafted by counsel for FABI six months before FABI disclosed its merger plan to the Bank's board of directors. JA 241, 318, 467, 479. As shown below, the board did not see or approve the proxy statement and never made the determination described therein.

2. The directors delegated the task of considering the merger proposal to a committee. Pet. App. 54a; JA 215, 232. The minutes of that committee's only meeting show no determination of the value of the stock, nor any decision to approve the merger because it offered a high value to minority stockholders. JA 450. The minutes state only that the committee approved a motion "to recommend to the Board of Directors at their meeting on February 12,

[11] The first amendment does not shield petitioners' false statements. The proxy statement is plainly commercial speech because, pursuant to the definition petitioners themselves recognize, it urged stockholders to approve a commercial transaction. *See Board of Trustees* v. *Fox*, 109 S. Ct. 3028, 3036 (1989); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). In the commercial context, misleading or false statements can plainly be prohibited without running afoul of the first amendment. *See Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 566 (1980).

1987 to accept the Holding Company's tender offer of $42 per share." *Id.*[12] No reason is stated.

3. Contemporaneous notes of the meeting, JA 451-457, show that the committee made no determination of high value. To the contrary, the notes show that the KBW representative who appeared at the meeting conceded that the market price was the "principal determinant" of the merger price, JA 454, even though the market was "not an open market," but one in which there was "little trading" and the "parent set the price." JA 452. Rather than obtaining a valuation of the stock, the participants in the meeting turned their discussion to "how to keep PR [public relations] afloat" and "how to prevent adverse reac. perception." JA 454.[13]

4. Relying on the committee's recommendation, the full board adopted a resolution drafted by counsel for FABI that the directors admitted was false. *See, e.g.*, JA 226, 251. The resolution recited that the directors had approved preliminary proxy materials presented to the meeting, JA 460, and that the merger was approved and found to be in the best interest of stockholders. JA 458. In fact, no proxy materials were presented to the meeting. JA 208, 226. *See also* Answers to Plaintiff's Third Set of Interrogatories to Director Defendants. The board was not shown—and did not approve, adopt or endorse—the six-month-old draft proxy statement, prepared by counsel for the other party to the transaction, that recited that the board had approved and was recommending the

[12] It has never been explained why the minutes refer to a "tender offer" to stockholders rather than a merger proposal.

[13] The committee considered obtaining a valuation of the minority stock, but was dissuaded from doing so when Beddow (in his dual role as FABI representative and Bank director) asserted that FABI would not pay a higher price than $42 per share even though an independent advisor determined that the stock was worth more than that amount. JA 261. The board's failure to determine the value of the stock at all is telling evidence that the board did not determine that the $42 price was a high value, as was misrepresented in the proxy statement.

merger because it provided a high value for the public stockholders. Moreover, the recitation in the resolution that the merger was found to be in the "best interests of First American Bank's shareholders" makes no reference at all to a high value, much less to the public (or minority) stockholders. The resolution is *entirely silent* as to why the merger was in the best interest of the public stockholders whose interest conflicted with that of the 85% stockholder who was taking their stock for $13 million less than what it was worth.

5. At trial, several directors admitted that *the board* approved the merger, not on the basis of any determination about the "opportunity" it provided for public shareholders to achieve a high value for their shares, but rather because *the board* believed it had no choice and would be replaced if it did not.[14]

Without a foundation in the language of the governing rule, petitioners argue that alleged difficulties in making accurate disclosure of reasons requires a judicially fashioned zone of immunity for such statements. But petitioners' purported policy considerations, Pet. Br. 22-29, are wholly insufficient to justify permitting directors blanket immunity for misstatements of reasons. Such a cramped view of the coverage of the proxy rules is an invitation to corporate deception, particularly in the freeze-out merger context. It would permit directors to agree among themselves that a price is low, or to make no judgment on the matter at all, and then inform shareholders that a transaction was approved because it represented a "high value," secure in the knowledge that federal law placed no constraints on their activities because they were simply expressing unverifiable "opinions." Such investor deception is diametrically opposed to the letter and spirit of federal law.

[14] For example, Director Dewberry conceded that the board approved the merger because it believed that it had "absolutely no other alternative * * * [t]here was nothing that we could do about it." JA 274. Director Michael admitted that the board believed that, if it did not approve the merger, FABI would replace it with a board that would. JA 281-282. Even chairman of the board Drewer conceded that the board "would have preferred to continue having minority stockholders." JA 213.

Requiring directors to be accurate when they disclose their purported reasons about such matters as the value of the corporation's stock does not present compliance or enforcement problems. Ordinarily, in a business context, directors of public companies articulate the considerations that prompt their action, and rely on written reports setting forth recommendations and supporting reasons. Certainly, drafting a proxy statement in light of the course of action on which directors have actually voted presents no great obstacle. Indeed, this case is anomalous in the directors' utter failure even to review the language in the proxy statement, or to have any idea of its contents, prior to authorizing it to be sent to shareholders. It is hardly surprising that a document drafted by the other party to the transaction months before the board meeting even took place is inaccurate. In the usual case, directors can easily read and agree upon proxy materials sent over their names. And corporate counsel, courts, and government agencies can compare the record of events surrounding the directors' determinations with the proxy statement's description of those events to determine whether disclosure is adequate and accurate.[15]

[15] It was precisely such a comparison that supported liability here. The jury, as it was entitled to do, obviously discounted the directors' self-serving explanations offered at trial in favor of the actual record of their actions: the directors declined to retain an investment advisor after being told that FABI would not make a higher offer regardless of an independent determination of value, *see supra* note 13; they acknowledged acting because FABI had the power to remove them from office, *supra* note 14; and they ultimately lent their names to a proxy statement that they never read or considered, *see supra* p. 17. Against that background, the jury had an ample, objective basis for finding that the proxy statement was false or misleading with respect to a "material fact."

Nor is a holding that liability was correctly imposed here inconsistent with federalism principles. Nothing in the decision below suggests that full disclosure of the directors' reasons would have subjected them to liability under federal law for having authorized a transaction deemed to be "unfair" under state law standards. *Cf. Santa Fe Industries* v. *Green*, 430 U.S. 462 (1977).[16]

Petitioners' solicitation of holders of securities registered under Section 12 of the Exchange Act [17] by means of a proxy statement containing misrepresentations of material fact triggered application of "the overriding federal law" requiring truthful disclosure *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 434 (1964). A false representation to stockholders in a proxy statement implicates both the general "philosophy of full disclosure" underlying the Exchange Act, *Santa Fe*, 430 U.S. at 478, and the specific proscription of Section 14(a), and the rules issued thereunder, against soliciting stockholders of registered companies by deceptive representations.[18]

---

[16] Again, it is important to underscore that the court of appeals did not hold that liability attaches to a "fairness" opinion with which a jury later disagrees, or that "fairness" is a universally required element of disclosure. For that reason, the SEC's opinion in *Franchard Corp.*, 42 S.E.C. 163, 177-178 (1964) (addressing whether disclosure should generally be required in a prospectus with respect to directors' compliance with state law standards of responsibility) does not assist petitioners in defending their particular affirmative misrepresentations. Indeed, *Franchard* itself pointed out that the SEC has "required disclosures concerning directors' performance in situations * * * where the prospectus has made affirmative representations by which their performance could be tested." *Id.* at 178 (footnote omitted).

[17] 15 U.S.C. § 78*l*.

[18] Because Section 14(a) "is expressly directed at communications with existing shareholders with regard to matters to be voted on at the shareholder meetings," it will necessarily apply to conduct that may also constitute a breach of duty under state law. Hazen, *Corporate Chartering and the Securities Markets: Shareholder*

The decision below did not intimate that directors are *required* to disclose and explore their reasoning process in a proxy statement. But when directors do so, federal law requires materially accurate statements. As pointed out by the Government, liability was imposed on petitioners for *what they put in* the proxy statement—not for failure to comply with any claimed affirmative duty to disclose subjective motives. GB 9. The case is exactly like an earlier instance in which FABI drafted a decision-maker's reasons for action in advance of the actual events, and then disseminated a proxy statement presenting the fiction as fact:

> Once the proxy statement purported to disclose the factors considered by [the decision maker], there was an obligation to portray them accurately. The drafters of the proxy statement could not legitimately attribute to [the decision maker] factors which he did not actually consider, thereby making his decision appear well-informed, and then shield themselves by arguing that [the decision maker's] subjective motivations are not material.

Berg v. *First American Bankshares, Inc.*, 796 F.2d 489, 496 (D.C. Cir. 1986) (citations omitted).[19]

Suffrage, Corporate Responsibility and Managerial Accountability, 1978 Wis. L. Rev. 391, 402 (1978). The fact that the federal remedy for the federal violation is not subject to all of "the hurdles that the victim might face" under state law, *Borak*, 377 U.S. at 435, is not a reason to deny the federal remedy. Enactment of the Exchange Act was based on the failure of state law to provide the investor confidence essential to the health of the national economy. Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. Corp. L. 1, 23 (1983). Petitioners' argument that state law hurdles should prevail over the congressional policy expressed in Section 14(a) ignores the constitutionally-mandated supremacy of federal law.

[19] None of the cases cited by petitioners sanctions the dissemination of a proxy statement attributing to the board a determination that the board did not make, or involves a false representation directly bearing on the value of the stock.

B. The Factual Representation That KBW Independently Passed On The Fairness Of The Merger To Minority Stockholders Was Misleading

Under this Court's decision in *TSC Industries* v. *Northway, Inc.*, it was the province of the jury to make the delicate assessments as to how the literal words of the proxy statement would be understood by the reasonable investor and to determine whether the statement so interpreted was materially false or misleading. *See also McMahan & Co.* v. *Wherehouse Entertainment, Inc.*, 900 F.2d 576 (2d Cir. 1990). The evidence presented at trial supported the jury in finding that the proxy statement's description of the role of KBW was a material misstatement of fact. The proxy statement said that KBW had been hired as "an independent investment banking firm, to pass on the fairness of the Merger," Pet. App. 38a, and that it had delivered "its written opinion as to the value to be ascribed to the estimated 15% of the shares of the Bank not owned" by FABI. *Id.* at 54a.

The jury was entitled to find that this language conveyed to a reasonable investor that KBW had independently analyzed the value of the Bank's stock and, on the basis of that valuation, had opined that the $42 price was fair to minority stockholders.[20] Indeed, this was the interpretation petitioners themselves urged to the jury:

---

[20] Although petitioners' liability with respect to the KBW representations does not rest solely on the use of the word "independent," petitioners' disavowal of the use of the word "independent" to connote "freedom from the influence of others," Pet. Br. 34, is contradicted by disclosures elsewhere in petitioners' own proxy statement. In another section, the proxy statement represented that the board of directors had not considered whether its accountant's "independence" might have been compromised by the Bank's prior retention of the accountant to perform a variety of professional services. Pet. App. 66a. The statement thus used the word "independent" to mean a party's judgment is not unduly influenced by others. *Cf. United States* v. *Arthur Young & Co.*, 465 U.S. 805, 819 n.15 (1984) ("Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an independent professional. * * * If investors were to view the auditor as an advocate for the corporate client, the value of the audit function itself might well be lost").

1. The Bank's Chairman, Milton Drewer, who signed the proxy statement, believed that the proxy statement was accurate and that KBW had "come up with" the $42 merger price "on its own." JA 204-205.

2. FABI opened its case to the jury on this same basis, asserting that it had asked KBW "to tell it what would be fair to pay for the shares of the minority * * *." JA 99.

3. FABI's Beddow repeated this claim, stating that "we decided instead of our making up our mind what a fair price should be to the minority shareholders, we should engage Keefe, Bruyette ahead of time and *let them tell us* what was a fair price to the minority shareholders * * *." JA 319 (emphasis added). *See also* JA 72 ("KBW had *independently determined* what would be a fair price") (emphasis added).

4. Moreover, FABI's Treasurer, Vincent Scoffone, testified that FABI took pains not to reveal its desired price range to KBW, because to do so would taint or improperly influence KBW's "fair value opinion." JA 173-174.

But the evidence showed that the proxy statement's version of the facts was false:

1. In testimony as the Bank's representative pursuant to Federal Rule of Civil Procedure 30(b)(6), the President of FABI admitted that FABI's Executive Committee and Chairman had reached a "consensus" at $40-42 as the price it wanted to pay before KBW was contacted. JA 188-191.

2. KBW's Connor admitted that, notwithstanding FABI's claims at trial, KBW had been given the $40-42 price by Beddow "right from the beginning" of their discussions. JA 259-260. *See also* JA 320.

3. Connor's testimony further showed that KBW did not, as the proxy statement represented, "ascribe a value" of $42 to the minority shares. Because of his stated view that "any price above the market would be fair in our view," JA 347, Connor stated that "[i]t was not necessary to get to $42 from the standpoint of the company or from the standpoint of the shareholders *if we had been advising the shareholders* to accept that level. We chose $42 because in our view if you are going to make an offer that is fair, make the maximum number offer which you are prepared to make." JA 356-357 (emphasis added). Connor and KBW simply endorsed the $42 because it was the price FABI wanted to pay. *Id.*

4. KBW's effort to "value" the minority shares, reflected in KBW work papers containing an analysis of price to earnings ratios of the Bank and comparable institutions, produced a value of $60.53 per share, nearly 50% higher than the price for which FABI sought KBW's endorsement. JA 505 (10.4 regional price earnings ratio multiplied by $5.82 earnings estimate). KBW promptly abandoned that analysis of value in favor of its endorsement of "any price above the market" as fair. Moreover, Connor admitted that KBW made no attempt to determine whether the $42 per share that minority shareholders received was equal consideration for the stock that FABI received in the merger. JA 358-359.

5. Connor's testimony showed that KBW did not "pass on the fairness" of the $42 price to the minority shareholders. By attaching KBW's fairness opinion to the Bank's proxy statement, Pet. App. 74a, petitioners plainly conveyed to the minority shareholders the false and misleading impression that KBW was opining that the $42 price was fair to them.[21] In fact Connor disclaimed ren-

[21] KBW's opinion letter furthered the false impression that KBW was opining that the $42 price was fair to minority shareholders by artfully departing from the firm's consistent practice—evidenced by numerous other KBW fairness opinions introduced at trial, JA 132—of clearly stating *to whom* it believed the price was fair.

dering any such opinion. JA 356-357, 359. Connor testified, instead, that KBW opined that the transaction was fair to FABI, JA 359, and KBW's engagement letter (which was not attached to or described in the proxy statement) limited reliance on its opinion to FABI. JA 441-442.

Petitioners' impassioned argument that liability was imposed simply for using the adjective "independent" ignores the evidence summarized above and the fact that the jury was instructed to consider, not merely the word "independent," but the assertion that KBW had "passed on the fairness of the merger" for the benefit of minority stockholders. JA 422. The court of appeals correctly held that it was within the province of the jury to determine that the proxy statement reasonably conveyed the impression that KBW passed on the fairness of the merger on the basis of its independent anaiysis of the value of the stock, and that such impression was false. Pet. App. 16a.[22]

Petitioners argue that the proxy statement's standard recitation that the investment banker rendered its valuation on the basis of information provided by the company and did not attempt to verify that information independently, makes it "hard to imagine how the proxy statement could have been any more candid or explicit" about the role of KBW. Pet. Br. 33. But even this boilerplate disclosure implies, falsely in this case, that the investment banker made an independent valuation.[23] One

[22] The court of appeals' decision did not turn, as petitioners would imply, Pet. Br. 34, on any perceived failure to disclose KBW's contingent fee arrangement with FABI. To the contrary, the court merely cited that contingent fee as one explanation for KBW's ready willingness to accept the $42 price that its client, FABI, had suggested to it. Pet. App. 16a.

[23] Language of this kind routinely appears in KBW fairness opinions. See the samples introduced as Plaintiff's Trial Exhibit X, JA 132.

readily imagines a more candid proxy statement: one that disclosed that KBW had not valued the stock, had been given the $40-42 range in advance, and was not opining to minority stockholders that the merger was fair to them.

Petitioners' lament about hapless use of the word "independent" rings hollow because the instant proxy statement reflects calculated circumvention of specific requirements of applicable disclosure rules.[24] Nor is recovery here an "insurance scheme for investors." FABI (which is indemnifying the directors) is simply being required to restore the unjust benefit it obtained by using a false proxy statement to obtain respondents' stock for a payment far below its value.

C. The Proxy Statement Did Not Disclose All Material Facts With Respect To The Directors' Recommendation And KBW's Role

Petitioners failed to discharge their duty "to state [all] material fact[s] necessary in order to make the statement [respecting the board's recommendation and KBW's role] not false or misleading."[25]

---

[24] Items 9(b)(5) and (6) of Schedule 13E-3 required that the proxy statement state "whether the issuer or affiliate determined the amount of consideration to be paid or whether the [investment banker] recommended the amount of consideration to be paid" and further required a statement of "the bases for and methods of arriving at [the investment banker's] findings and recommendations" and any "instructions received from the issuer or affiliate * * *." 17 C.F.R. § 240.13e-100, Items 9(b)(5), 9(b)(6). The FDIC's policy at the time of the merger required petitioners to comply with Rule 13e-3 "in all material respects." *See* 45 Fed. Reg. 62,481-62,482 (1980) (proposed rule); 46 Fed. Reg. 25,205-25,206 (1981) (final rule). *See also* 12 C.F.R. § 335.409 (FDIC's current rule).

[25] 12 C.F.R. § 335.206(a); *see also* 17 C.F.R. § 240.14a-9 (SEC counterpart to FDIC rule). Petitioners recognized this duty in their proposed jury instructions. JA 412, 424. *See also Eisenberg* v. *Gagnon*, 766 F.2d 770, 776 (3d Cir.), *cert. denied*, 474 U.S. 946

1. The proxy statement implied that the board's determination that the $42 represented a high value was supported by the fact that the price was the product of "the negotiations in which the price per share to be paid was agreed on." Pet. App. 54a. In fact, there were no negotiations. JA 209-210.

2. The proxy statement represented that the $42 price represented a premium over book value, Pet. App. 54a, without disclosing that the appreciated value of the Bank's real estate (not reflected in book value) eliminated any premium over book value. JA 199-200, 280, 455.

3. The proxy statement represented that the $42 price was a premium over the market price, Pet. App. 53a-54a, without disclosing that KBW's concession that the market was thin, dominated by FABI, and "not an open market." JA 452.

4. The proxy statement represented that the $42 price was a premium over book value and market price, without disclosing going-concern value or the Treasurer's memorandum and KBW's work papers reflecting going-concern value in excess of $60. *See* JA 437-439; *supra*, p. 24.[26]

(1985); *First Virginia Bankshares* v. *Benson*, 559 F.2d 1307, 1317 (5th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *Tanzer* v. *Haynie*, 405 F. Supp. 650, 654 (S.D.N.Y. 1976).

[26] *Howing Co.* v. *Nationwide Corp.*, 826 F.2d 1470, 1479 (6th Cir. 1987) (failure of proxy materials to provide reasonably detailed analysis of each of the financial evaluation methods discussed in Rule 13e-3, including going-concern value, prevented shareholders from having "the information necessary to make an informed decision * * *"), *cert. denied*, 486 U.S. 1059 (1988); *Meyers Parking Systems, Inc.*, Exchange Act Release No. 26,069, 41 SEC Docket 1061, 1064-65 (Sept. 12, 1988) (if a particular source of value referred to in Schedule 13e-3, such as going-concern value, was disregarded, disclosure document should state the reasons for disregarding it); Charles L. Ephraim, SEC No-Action Letter (Sept. 30, 1987) (because information "relating to the purpose for and fairness of the transaction * * * is particularly important to share-

5. Because of the board's access to information about the value of the minority stock that was not available to minority stockholders, the board's representation that the $42 price was a "high value" implicitly represented that the board had made a sufficient examination to form an honest opinion based on facts that the $42 price was a high value.[27] It was thus misleading to state that the price represented a high value without disclosing the board's specific determination not to obtain an independent valuation of the stock when told by FABI that it would not pay more than $42 even if such a valuation showed that price to be a low one.

Petitioners ignore the evidence supporting the jury's verdict, and content themselves with the idle rhetoric that, if the proxy statement were interpreted in the very benign respect in which petitioners see it—and not as the jury found it to be—two of the stockholders were not deceived by it. Pet. Br. 36-37.

This rehash of petitioners' reliance argument—rejected by the court of appeals and not even raised in the petition for certiorari—ignores the rule the jury determines whether a fact would be material to a reasonable investor. *TSC Industries*, 426 U.S. at 450. That petitioners did not succeed in fooling each and every stockholder is beside the point:

---

holders," reports and appraisals prepared in contemplation of the transaction and which relate to the purpose for, and fairness of, the transaction must be disclosed).

[27] *SEC* v. *Falstaff Brewing Corp.*, 629 F.2d at 75. *See generally Dan* v. *Avery*, 548 F.2d 1018, 1026-27 (D.C. Cir. 1976) (representation by fiduciary or one who has access to facts unavailable to listener may reasonably be understood not merely as opinion but as "assertion of fact upon which the recipient of the representation might prudently rely"), *cert. denied*, 431 U.S. 908 (1977); Restatement (Second) of Torts § 539 (1976) (representation by one with access to information not available to recipient may reasonably be understood as representing that the speaker has made a sufficient examination to form an honest opinion based on facts).

> It is abundantly clear that Congress' intent to protect the investing public would be seriously hampered if one who misuses the proxy process cannot be brought to task by those shareholders who have from the outset recognized his deceptions, but has only to fear that the other shareholders whom he has successfully beguiled will belatedly become enlightened and seek redress for the damage he has done them.

Corin v. *Bresler*, 741 F.2d 410, 427 (D.C. Cir. 1984) (Bork, J.) (quoting *Lynch* v. *Falks*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,831 at 90,134 (D. Kan. Dec. 12, 1980)).

II. THIS COURT SHOULD NOT CONSIDER THE CAUSATION ISSUES ASSERTED BY PETITIONERS BECAUSE THOSE ISSUES WERE WAIVED IN THE COURTS BELOW AND THE COURT OF APPEALS DID NOT DECIDE THEM

Petitioners never argued in either of the courts below that causation could not be shown where a stockholder owns sufficient stock to approve the merger. Indeed, their briefs in the Fourth Circuit did not even mention *Mills* footnote 7, now heralded as "famous" and dispositive. Petition at 20. Having solicited minority stockholder proxies, there were tactical and business reasons for petitioners not to claim that the solicitation of proxies was only an idle charade because their raw power entitled them to deceive with impunity.

Indeed, petitioners asked the jury to find that minority stockholder approval insulated the merger from an otherwise paralyzing conflict of interest. Petitioners thus were in no position to ask the jury to find that minority stockholder approval was unnecessary. They kept that argument in their back pocket until after respondents had expended enormous sums obtaining a verdict and its affirmance, and the judicial system had provided the resources for extensive pretrial procedures, a trial and an appeal. "Considerations of fairness to the court and

to the parties and of the public interest in bringing litigation to an end after a fair opportunity has been afforded to present all issues of fact and law" militate strongly against permitting petitioners to reverse their position at this late stage of the case. *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936).[28]

In the courts below FABI and the directors filed separate answers, motions, and requests for instructions, and otherwise pursued their claimed separate interests separately. Neither set of defendants asserted the causation issue as a basis for a dispositive motion. Instead, the directors expressly conceded in their summary judgment motion that: "The notion of causation has been broadly defined in cases construing § 14(a). If the proxy solicitation is 'an essential link in the accomplishment of the transaction, causation may be established.' *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970)."[29] The directors' motion for a directed verdict did not, as Federal Rule of Civil 50(a) requires, specifically raise the causation issue.[30] The directors did not object to any

[28] Pursuant to Supreme Court Rule 15.1, respondents' Brief in Opposition to the Petition alerted the Court to petitioners' waiver of the causation question. *See also Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985). Although the decision to grant certiorari is made "with a view to deciding the merits" of the questions presented, *id.*, that decision does not foreclose further consideration of the waiver question. *See, e.g., City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987). If it were otherwise, the Court would never decide the merits of a waiver question.

[29] Memorandum of Director Defendants' [sic] in Support of Motion for Summary Judgment, at 13.

[30] The directors were thus precluded from asserting causation as a basis for judgment notwithstanding the verdict by the fundamental rule that JNOV is only available on the specific grounds raised in support of the motion for a directed verdict. *See* Fed. R. Civ. P. 50(b) (JNOV motion is a "later determination of the legal questions raised by the motion" for a directed verdict); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2537, at 598 (1971) (motion for JNOV "cannot assert a ground that was not included in the motion for a directed verdict").

jury instruction pertinent to causation."[31]

FABI's passing reference to footnote 7 of *Mills* in its motion for summary judgment was made in support of the argument that plaintiff's subjective reliance was a necessary element of her case—not that FABI's voting strength precluded an action under Section 14(a). *See* JA 75. It was *that* argument—and not a causation argument—that petitioners raised in the court of appeals.[32] The Fourth Circuit answered the question in the negative, holding that "reliance, even when the minority's voting strength is insufficient to halt a merger, is not an element of causation in a § 14(a) action." Pet. App. 14a. In a footnote, the court noted that "[i]t is conceded that the proxy statement was, under Virginia law, an essential link for accomplishing the merger." Pet. App. 13a n.1. *See* JA 250.

[31] The parties' objections to the jury instructions are found at JA 433-436. Messrs. Cawley and Sayers, of Hunton & Williams, spoke on behalf of FABI. Messrs. Stump, Murphy and Vieth, of McGuire, Woods, Battle & Boothe, spoke for the directors. Federal Rule of Civil Procedure 51 makes plain that "[n]o party" may challenge the giving of an instruction unless "that party" has properly objected thereto. Thus, the courts of appeals have held that each party wishing to pursue a challenge to jury instructions must itself have objected at trial. *See, e.g., Osterneck* v. *E.T. Barwick Indus.*, 825 F.2d 1521, 1532-1533 (11th Cir. 1987), *aff'd*, 489 U.S. 169 (1989).

[32] Petitioners presented the case to the court of appeals this way:

> This case presents a simple question for the Court. The question is whether a plaintiff who did not grant a proxy, who admitted she did not rely upon anything in a proxy statement, and who voted against the transaction for reasons unrelated to the proxy statement, can maintain a direct action for damages under Section 14(a).

Fourth Circuit Brief of Appellants First American Bankshares, Inc. and Virginia Bankshares, Inc., at 12.

The Court ought not assume that this cryptic reference by the court of appeals to a concession on an issue not raised in the briefs constituted a decision by the court of appeals warranting review by this Court. *City of Springfield* v. *Kibbe*, 480 U.S. at 259. Even if the Court were to assume that the court of appeals did consider the issue, review is not advisable here. *Id.* ("That the Court of Appeals was fortunate enough to entertain the issue * * * would not justify our running the same risk" of reversing a judgment because of instructions petitioner accepted). Unlike the situation in *Oklahoma City* v. *Tuttle*, 471 U.S. at 815, the issue was not fully briefed and argued in the court of appeals. Nor was the question "very clearly considered, and decided, by the Court of Appeals," as in *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988). And, petitioners' protestations notwithstanding, the legal issue now raised is not "in a state of evolving definition and uncertainty" requiring this Court's intervention," as in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981).[33] The fortuity that the court of appeals repeated petitioners' concession should not be a basis for reviewing the jury's verdict on grounds not asserted in either the district court or the court of appeals. To allow review on such a fortuity would be imprudent and unjust.[34]

The Court should not review the causation issues for the additional reason that doing so would reward and

[33] There has been no conflict among the circuits on the question. *See* GB at 22 n.34.

[34] Petitioners chastise the court of appeals for failing to decide issues petitioners did not present, or for imprecision in the language of its opinion. Yet this court sits to review judgments, not opinions. *Rogers* v. *American Hospital Ass'n*, 476 U.S. 610, 625 n.11 (1986) (Stevens, J., plurality opinion). *See also Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Block* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956); *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions").

encourage faithlessness to the record of the kind exhibited here. For example, although the district court gave the proximate cause instruction requested by petitioners, JA 83, 92, 424, petitioners tell this Court that "the jury was never asked to find any causal link." Pet. Br. 17. Similarly, petitioners fault the district court for not giving a causation instruction they never sought. Pet. Br. 48. The fact that petitioners never advanced their preclusive causation argument to the court of appeals explains why the court of appeals did not discuss it. Yet petitioners characterize the court of appeals' silence as a holding that "dispensed with the requirement of proof of causation," Pet. Br. 17, and go so far as to assert that the court of appeals' silence "acknowledged" that respondents could not demonstrate causation. *Id.* Such uses of the silence resulting from petitioners' own failure to raise issues below make plain the wisdom of refusing to allow petitioners to raise those issues now.

III. THE JURY'S VERDICT THAT THE DECEPTIVE PROXY SOLICITATION CAUSED RESPONDENTS' INJURY SHOULD BE AFFIRMED BECAUSE THE ISSUE WAS SUBMITTED TO THE JURY ON CORRECT INSTRUCTIONS AND THE EVIDENCE SUPPORTED THE VERDICT

A. The Court Should Reject Petitioners' Preclusive Causation Argument

In *Mills* v. *Electric Auto-Lite Co.*, this Court held that "[w]here there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." 396 U.S. at 385.[35]

[35] The Court adopted "[t]his objective test" because it "will avoid the impracticalities of determining how many votes were affected,

In *Mills*, the proxy solicitation was an essential link in the accomplishment of the transaction because the defendants, who controlled 54% of the outstanding shares, needed a two-thirds vote to approve the merger. In footnote 7 of its opinion, the Court said that:

> We need not decide in this case whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority. Even in that situation, if the management finds it necessary for legal or practical reasons to solicit proxies from minority shareholders, at least one court has held that the proxy solicitation might be sufficiently related to the merger to satisfy the causation requirement, see *Laurenzano* v. *Einbender*, 264 F. Supp. 356 (D.C. E.D.N.Y. 1966); * * *.

Id. at 385 n.7.

Petitioners urge the Court to resolve this question by adopting a procrustean rule that would preclude minority stockholders from proving that a deceptive proxy statement caused them injury, even though (1) minority stockholder approval was necessary to accomplish the transaction at issue, or (2) injury otherwise flowed directly from the statutory violation.

The Government's Brief demonstrates that a variety of injuries might flow directly from a deceptive proxy statement in these circumstances, and explains why these injuries should not be denied redress by a rule that precludes a showing of causation as a matter of law. We join in the Government's arguments against such a rule.

The error of petitioners' position is particularly egregious in situations where, because of the circumstances of the particular case, minority stockholder approval is

---

and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." 396 U.S. at 385.

necessary to accomplish the transaction even though a stockholder controls sufficient votes to grant itself the margin of approval normally required for such a transaction. For example, the votes of minority stockholders may be necessary to ratify action by the board of directors that is voidable because a conflict of interest infects the board's action.[36] In such circumstances, the votes of a majority of the minority stockholders are necessary to accomplish the transaction and thus the proxy solicitation is just as necessary as was the solicitation in *Mills*. Soliciting those votes by means of a materially misleading proxy statement causes an injury to minority stockholders that flows directly from the statutory violation and is plainly within the ambit of injuries against which the statute was designed to protect. As shown *infra*, pp. 43 to 44, just such injury was proved here.

Similarly, minority stockholders' injury may flow directly from the use of a deceptive proxy statement where a controlling stockholder determines that it will not compel a freeze-out merger unless it is approved by minority stockholders. In that circumstance, the votes of the minority stockholders are again necessary to accomplish the merger, and a deceptive proxy statement injures rights protected by Section 14(a).[37] Again, as shown *infra*, pp. 45 to 46, this injury was also shown here.

---

[36] *See, e.g., Robbins* v. *Banner Indus.*, [1967-1969 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,309 at 97,467 (S.D.N.Y. Nov. 27, 1968) (causation shown with respect to proxy statement seeking approval of issuance of stock to directors at inadequate price because the votes of minority stockholders, although not necessary to approve the self-dealing transaction, were necessary to ratify it).

[37] *See, e.g., Efros* v. *Nationwide Corp.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,077, at 95,119 (S.D. Ohio Jan. 17, 1983) (parent reserved the right to cancel merger if a majority of minority stockholders voted against it). "It has become a standard practice to make buyouts contingent on approval by a majority of the shareholders who are to be bought out." Booth, *Management Buyouts, Shareholder Welfare, and the Limits of Fiduciary Duty*, 60 N.Y.U. L. Rev. 630, 657 (1985).

The Government demonstrates at pages 24-26 of its brief that there are a variety of other instances in which minority stockholder injury results from a false proxy statement's "distortion of the voting process," even though a single stockholder owns sufficient stock to grant itself the margin of approval normally required for the transaction. These circumstances need not be addressed in this case because respondents proved that minority stockholder approval was necessary to accomplish the transaction and thus showed precisely the kind of injury involved in *Mills*. Nonetheless, the Court should be loathe to adopt a rule that forever forecloses consideration of claims arising out of all such circumstances.

Petitioners' contrary argument assumes that minority stockholders are, like tender offerors with respect to Section 14(e), "outside the scope of the concerns articulated in the evolution of [the] legislation." *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 33 (1977). *See* Pet. Br. 42. Neither the text of Section 14(a) nor its legislative history so suggests.

As the court said in *Cowin* v. *Bresler*, 741 F.2d at 427 (Bork, J.), there is no basis or need for judicial restriction, on the class of potential plaintiffs under Section 14(a) because "the conduct proscribed in the statute—deceptive proxy solicitations—is itself a means by which the plaintiff class is defined and restricted." *Id.* at 426 n.21. The taking of minority stock at an inadequate price pursuant to a false proxy statement is within the scope of injury contemplated by Section 14(a). *Id.* at 428.[38]

[38] Contrary to the assertion at page 43 of petitioners' brief, Professor Hazen was not addressing the application of Section 14(a) when he questioned whether "recent corporate mismanagement cases under rule 10b-5" are consistent with this Court's concern of freeing the federal courts from claims based on state law breaches of fiduciary duty. *See* 1 T. Hazen, *The Law of Securities Regulation* 669-670 (2d ed. 1990). Petitioners ignore Professor Hazen's—and this Court's—insistence on the need for careful distinction between Sections 10(b) and 14(a). *See Basic, Inc.* v. *Levinson*, 485 U.S. at 243; Hazen, *supra* note 18, at 418, 425.

The legislative history so demonstrates. "Section 14(a) stemmed from the congressional belief that '[f]air corporate suffrage is an important right that should attach *to every equity security* bought on a public exchange' H.R. Rep. No. 1383, 73d Cong., 2d Sess., 13 (1934)." *Mills*, 396 U.S. at 381.[39] The congressional purpose includes concern that stockholders be adequately informed about corporate activities, especially conflict of interest transactions.[40] *See Cowin* v. *Bresler*, 741 F.2d at 427; *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 383 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975).

Petitioners recognize that the right to "fair corporate suffrage" protected by Section 14(a) encompasses "corporate debate" and "corporate democracy"—a system in which minority stockholders can cause modification or withdrawal of a proposed merger by reasoned argument grounded in truthful disclosure. Pet. Br. 28. That is why, as explained in the principal case cited in footnote 7 of *Mills*, it is not "to be *assumed without evidence* that the solicitation of proxies was a gratuitous and, therefore, purposeless and legally inert act." *Laurenzano* v. *Einbender*, 264 F. Supp. 356, 361-362 (E.D.N.Y. 1966).[41]

[39] Section 14(a) now applies as well to securities, like those at issue here, registered under Section 12 of the Exchange Act, 15 U.S.C. § 78*l*. Section 14(a) continues to differ from Section 10(b), which applies to all securities without limitation.

[40] *See* S. Rep. No. 1455, 73d Cong., 2d Sess. 74 (1934) ("In order that the stockholder may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened * * * as to the major questions of policy, which are decided at stockholders' meetings."); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 14 ("Insiders have at times solicited proxies without fairly informing the stockholders * * * and have used such proxies to take from the stockholders for their selfish advantage valuable property rights"). *See also* S. Rep. No. 1455, 73d Cong., 2d Sess. 77 (1934).

[41] *Accord Swanson* v. *American Consumer Indus.*, 415 F.2d 1326, 1332 (7th Cir. 1969) ("[w]e are not prepared to sanction

Whether petitioners' violation of respondents' voting rights caused respondents' injury should not be foreclosed as a matter of law simply because of FABI's stock ownership.

B. The Causation Issue Was Submitted To The Jury On Proper Instructions In Which All Of The Parties Concurred

In submitting the causation question to the jury, the district court instructed—as all the parties requested—that the plaintiff was required to show that petitioners' conduct with respect to the proxy statement was a substantial factor in causing her injury, and that the injury was a direct result or a reasonably probable consequence of petitioners' act or omission. JA 424. The jury was also instructed—again at the request of all parties—that the plaintiff was not required to prove subjective reliance if she proved that the proxy statement was an "essental link" in accomplishing the merger, and that the jury could find that the proxy solicitation was an essential link if it was necessary for the Bank to solicit proxies from minority stockholders. JA 420, 426; *see also* JA 81-82, 91.

These instructions were plainly correct.[42] The district court's proximate cause instruction, requested by petitioners, JA 83, 92, was substantially the same as that applied to a private action for damages caused by a misleading proxy statement in the American Law Institute's *Federal Securities Code*.[a] The "no reliance necessary" instruction accurately stated the doctrine of *Mills* and of *Basic, Inc.* v. *Levinson*, 485 U.S. at 243, that a plaintiff in a Section 14(a) case need not prove subjective reliance if the proxy solicitation was an essential link in the transaction.

Finally, the court's instruction accurately stated the law that a proxy solicitation is an "essential link" where the votes solicited are necessary to accomplish the transaction. This is the only point on which the Government and respondents part company. The Government apparently believes that the instruction permitted the essential link finding to rest, as the court of appeals' footnote arguably did, Pet. App. 13a n.1, solely on a state-law requirement that a notice of meeting or information statement be issued. Respondents believe that is *not* the case because the instruction defined essential link in terms of whether it was *necessary* to *solicit* proxies from minority shareholders, thus requiring that the votes were necessary to accomplish the transaction. The Government's Brief assumes—erroneously, we believe—that minority stockholder approval cannot be "necessary" if the controlling stockholder has votes sufficient to grant itself the margin of approval normally required for the transaction. The evidence here showed, however, and the jury found that minority stockholder approval was necessary

---

a rule of causation which would presume that full disclosure to minority shareholders could have no transactional function in corporate affairs"); *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d at 384 ("[w]e cannot assume that even a rapacious controlling management" would not modify or reconsider the terms of a merger as a result of truthful disclosure). Petitioners focus their attack on the Second Circuit's decision in *Schlick*. For the reasons explained in the text, we submit that *Schlick* correctly held that the mere fact that a controlling stockholder can grant itself stockholder approval of the merger does not preclude an action under § 14(a). This case, however, is squarely within the rule of *Mills* because minority stockholder votes were necessary.

[42] The director defendants offered no objection whatsoever to the district court's causation instructions. *See supra* note 31. FABI concurred in giving the proximate cause instruction and in defining essential link in terms of a need to solicit proxies. JA 82. Petitioners are thus barred from claiming error in instructions to which they did not object. Fed. R. Civ. P. 51.

[a] The Code, for which Professor Loss served as the Reporter, requires proof that the loss "is 'caused' by specified conduct to the extent that (A) the conduct was a substantial factor in producing the loss, and (B) the loss was of a kind that might reasonably have been expected to occur as a result of the conduct." American Law Institute, *Federal Securities Code* § 202(19) (1980).

to ratify otherwise voidable board action and to satisfy a condition of the merger. *See infra* pp. 43-46.

Even on this point, however, the Government recognizes that the judgment may not depend on the validity of the "no reliance necessary" instruction. GB 28. We believe it does not because the jury was required to read that instruction together with the proximate cause instruction, which required a showing that petitioners' conduct with respect to the deceptive proxy statement injured minority stockholders in a way that flowed directly from or was a reasonably probable consequence of petitioners' conduct."[44]

Moreover, the Government explicitly takes no position as to whether the point was properly preserved. GB n.49. In fact, it was not. The directors did not object to the instruction at all, and FABI concurred in defining essential link in terms of whether it was necessary to solicit proxies. JA 81-82.

Although they never requested it to do so, petitioners now argue that the district court should have instructed the jury that the plaintiff was required to prove that she would have succeeded in preventing the merger if petitioners had made truthful disclosure in the proxy statement. Pet. Br. 46.[45] Petitioners' argument should be rejected because the district court was not required to enumerate factors that might defeat proximate causation, *Van Buskirk* v. *Carey Canadian Mines, Ltd.*, 760 F.2d 481, 494 (3d Cir. 1985), or to particularize ways in which proximate causation might be shown. *Merrick* v. *Farmers Insurance Group*, 892 F.2d 1434, 1442 (9th Cir. 1990).

[44] The jury was specifically instructed, in accordance with the controlling legal principle, *see, e.g., United States* v. *Park*, 421 U.S. 658, 674 (1975), that "[y]ou are not to single out one instruction alone as stating the law, but should consider the instructions as a whole." Fourth Circuit JA 1707.

[45] This argument, which is based on Rule 10b-5 cases where stockholder proxies were neither necessary nor solicited, ignores the holding of *Mills* that where, as here, the solicitation is necessary to accomplish the transaction, the plaintiff is required only to show the existence of material misstatements and need not show that "the defects actually had a decisive effect on the voting." 396 U.S. at 385.

The cases cited by petitioners differ from this case because they involved claims of injury other than interference with a proxy solicitation. The case now principally relied on by petitioners, *Madison Consultants* v. *FDIC*, 710 F.2d 57 (2d Cir. 1983), suggests that, in such cases, (1) a misstatement is material if the plaintiff can prove that he or she had some available "means of self-protection," *id.* at 64, and (2) causation could be established by proof that defendant's wrong proximately caused plaintiff's failure to obtain the claimed means of self-protection. *Id.* at 65.[46] *See also Santa Fe Industries* v. *Green*, 450 U.S. at 474 n.14 (allegedly deceptive failure to give advance notice of Delaware short form merger not material because appraisal proceeding sole remedy under Delaware law). In this case, however, petitioners concurred in defining materiality in terms of significance to a reasonable stockholder's decision as to how to vote.[47]

Petitioners' own cases make clear that, even where the injury is that defendant's deception prevented plaintiff from pursuing an available means of self-protection, a general proximate cause instruction such as the one given in this case adequately instructs the jury as to causation. The one case cited by petitioners that involved

[46] Judge Mansfield's opinion makes clear that "[t]his standard" does not obligate a plaintiff to prove beyond a reasonable doubt or to an absolute certainty" that he would have achieved his means of self-protection; he needs "to prove only by a fair preponderance of the evidence that he would have succeeded." 710 F.2d at 65.

[47] Petitioners did not object to the instruction at JA 129 and proposed a similar instruction themselves. *See* JA 91.

instructions, *Healy* v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F.2d 641, 648-649 & n.5 (3d Cir. 1980), held just that. And, as noted, the ALI has endorsed such an instruction in its Federal Securities Code. *See supra* note 43. As shown below, the evidence here showed that petitioners' deceptive proxy solicitation proximately caused respondents' loss of available means of self-protection because the minority stockholder approval thereby obtained (1) prevented respondents from obtaining the rescission or restitution of the fair value of their stock, to which they were entitled in the absence of such approval; and (2) denied respondents the intra-corporate protection against completion of the merger that would have resulted from disapproval of the merger by minority stockholders.

Finally, petitioners' argument that truthful disclosure could not possibly have provided a basis for enjoining the merger is at once irrelevant and self-defeating. It is irrelevant because respondents proved injury to their voting rights, not injury to their ability to bring a lawsuit; there was *no* proof by any party at trial about ability to obtain or not obtain an injunction. It is self-defeating because the verdict below establishes that respondents were able to show the falsity of petitioners' representations respecting the merger once they were able to pierce behind the deceptive proxy statement. In other words, truthful disclosure *would* have provided exactly the ammunition respondents needed but were denied by the deceptive proxy statement, but that is not the injury respondents proved here.[48]

[48] The state court dismissed the complaint on its face, prior to any discovery, on the ground that there was no equitable appraisal remedy, but granted leave to amend to file an action at law. As the court of appeals held was entirely proper, a new action was instituted in federal court following consummation of the merger. Pet. App. 24a-25a.

C. The Evidence Of Causation Supported The Verdict

Petitioners' final causation argument is that respondents' proof of causation was insufficient. This argument was waived by petitioners' failure to move for a directed verdict on that ground or to raise the point in the court of appeals.[49] In any event, petitioners could overturn the jury's verdict only if they could show that there was no evidentiary basis for the verdict. *Lavender* v. *Kurn*, 327 U.S. at 653 (1946). Such a showing cannot be made here; there was ample basis for the verdict.

The evidence showed that it was necessary to solicit proxies from minority stockholders for two reasons. First, petitioners themselves asked for and received a jury instruction which showed that petitioners were relying on approval by minority stockholders to cure the fundamental defect in the merger created by director Beddow's conflict of interest. Petitioners conceded to the jury that FABI director Beddow acted as a representative of FABI on the Bank's board, and that his participation as a director of the Bank in the Bank board's approval of the merger created a conflict of interest. Fourth Circuit JA 1093-1094.

Under Virginia law and the specific terms of the Virginia director conflict of interest statute, Va. Code Ann. § 13.1-691, the Bank board's approval of the merger was voidable unless the material facts concerning the merger and Beddow's interest were disclosed to and approved by either the board of directors or the minority stockholders, or there was a judicial determination that the merger was fair to minority stockholders. Unless the defect caused by the conflict of interest was cured, the merger was void-

[49] The evidence is not reviewable on appeal unless a motion for a directed verdict on that ground was made in the trial court. *See Meriwether* v. *Coughlin*, 879 F.2d 1037, 1044 (2d Cir. 1989) (appellate review available only on the specific ground stated in the motion); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2536, at 593.

able without any showing of harm at the suit of any minority stockholder, (*id; Kessler* v. *Commonwealth Doctors' Hospital, Inc.*, 212 Va. 497, 503, 185 S.E.2d 43, 47 (1971); 3 W. Fletcher, *supra*, § 917), and was also subject to suits by individual stockholders for restitution of the fair value of their stock. *Rowland* v. *Kable*, 174 Va. 343, 370, 6 S.E.2d 633, 644 (1940).

The board that "exercised no independent judgment whatsoever" with respect to the merger but "merely rubber-stamped everything placed before them" by FABI's Beddow, Pet. App. 19a, plainly could not exercise the independent judgment needed to cure the conflict. *Borden* v. *Sinskey*, 530 F.2d 478, 494-495 (3d Cir. 1976); *Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 26 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972).[50] Initiating an action to obtain a judicial determination of the fairness of the merger was suicidal; as shown by the jury's specific finding below, and suggested by FABI's own internal study, the stock taken for $42 had a value of $60. JA 437-439; 527. Accordingly, the only method of making the merger effective was to obtain minority stockholder approval of the transaction.

Petitioners graphically showed the jury that the minority votes they solicited were not superfluous by asking for and receiving a jury instruction that Virginia's prohibition of director conflict of interest did not apply to the merger if the jury found that "*the minority stockholders of the First American Bank * * * approved of the merger* * *." JA 431 (emphasis added). Thus, the votes of minority stockholders were necessary—and urgently solicited—to ratify the otherwise voidable acts of the board respecting the merger and eliminate the right of minority stockholders to restitution of the $60 value of their stock taken in the merger.

---

[50] Moreover, there was not full disclosure to the board. For example, the board was falsely told that KBW had originated the $42 merger price when, in fact, it had not. JA 204-205.

The evidence also showed that minority stockholder approval was necessary to satisfy a condition established by FABI. The evidence showed that FABI had determined that it was not prepared to suffer the harmful business effects of widespread opposition by stockholders—many of whom were Bank customers—to the use of raw economic power to take the minority's stock at an unfair price and that, accordingly, it would not compel the merger unless it was approved by the minority stockholders. FABI admitted at trial that it sought "a friendly transaction," which required a price viewed as "so high that any reasonable shareholder will accept it." JA 99. Petitioners' business goals required a transaction that would result in "no loss of support for the bank out in the community, which was important." JA 109. FABI thus sought to insure that the Virginia stockholders would "respond favorably to [the $42] price," JA 192, by means of a proxy solicitation designed to convince minority stockholders that the $42 price was a high value.

FABI told KBW's Connor that FABI wanted its price to "be *deemed to be* fair by the minority shareholders," JA 341 (emphasis added). As Connor said, FABI wanted to "*show those minority shareholders* that we [FABI] are being fair * * *." JA 347 (emphasis added). Accordingly, Connor met with a group of the Bank's directors (whom FABI regarded primarily as stockholders for this purpose, JA 192) to "make a case for the $42 price," JA 276, as part of an effort to test the water to see if stockholders generally would accept the $42 price without resistance. JA 353. Discussion focused on the need for minority stockholders to support the taking of their stock at the $42 price: as notes of the meeting put it, "how to keep PR [public relations] afloat" and "how to prevent adverse reac[tion] /perception." JA 454.

In view of the admitted need for a favorable response from minority stockholders, the jury was justified in concluding that when FABI's chairman said that the Bank's

board would "have to go to the stockholders * * * for *their* approval," he was not referring to his own approval as the agent of the 85% stockholder, but rather to approval by the 15% minority whose proxies FABI urgently solicited.[51] The directors admitted in the district court that their approval of the merger was made in the context of submitting it to stockholder "ratification," presumably by stockholders other than the one seeking the merger. Memorandum of Director Defendants' [sic] in Support of Motion for Summary Judgment, at 7.

If petitioners' solicitation of proxies from minority stockholders was undertaken for any reason other than the need "*for their approval*," the pertinent evidence was within petitioners' control, but not adduced at trial. Petitioners had every opportunity at trial, and control over the pertinent witnesses, to introduce evidence that their urgent solicitation of minority stockholder votes was unnecessary because FABI intended to force the merger on minority stockholders even if a majority of them failed to respond to the urgent solicitation of their votes. Petitioners introduced no such evidence, and made no such argument at trial. In these circumstances, "[s]ilence then becomes evidence of the most convincing character." *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939).

Moreover, the evidence showed that opposition to FABI's price had blocked its attempt, just a year earlier, to acquire the minority stock of its Maryland subsidiary, and that such opposition had developed when the board of the Maryland bank retained an investment advisor, who determined that FABI's price was inadequate. *See supra*, p. 4. FABI insisted at trial that its business con-

[51] FABI was not committed to the merger until after it knew the results of the proxy solicitation. The merger agreement effectively gave FABI an option by making the agreement contingent on approval of two-thirds of the stockholders. JA 463. FABI did not commit itself to vote its shares in favor of the merger but only stated its intent to do so. Pet. App. 37a, 45a.

sideration required a "friendly transaction," and Chairman Drewer testified that the Virginia board would not have consummated the merger if the price had been shown to be unfair.[52] JA 229. The jury was entitled to find that truthful disclosure would again have demonstrated the gross inadequacy of FABI's price and again halted the merger.

The evidence also showed that the deceptive proxy statement caused respondents to lose another means of self-protection—a suit for restitution of the value of the stock taken in the merger—on which minority stockholders would have prevailed on the basis of the *admitted* conflict of interest (Fourth Circuit JA 1094; *see* JA 527) and proof that, as the jury found, their stock was worth $60. Thus, even under the terminology preferred by petitioners, the evidence supported a verdict that petitioners' deceptive proxy statement proximately caused respondents' loss by depriving them of remedies to which they were clearly entitled in the absence of minority stockholder approval.

While some "measure of speculation and conjecture" is inevitable, the jury's verdict is infirm only where its conclusion has no evidentiary basis. *Lavender* v. *Kurn*, 327 U.S. at 653.[53] There was an ample—and unchallenged—evidentiary basis here for the jury's verdict for respondents.[54]

[52] As noted above, Virginia law permits the board to decline to consummate a merger after stockholder approval.

[53] *See Dasho* v. *Susquehanna Corp.*, 461 F.2d at 28 (Stevens, J.) (proof as to what exchange ratio would have been in the event of truthful proxy statement disclosure can be adequately established under "the same standards that juries employ to determine comparable issues in other complex commercial litigation * * *").

[54] In the event of any disposition other than affirmance or dismissal of the writ, the Court should remand to the court of appeals for a determination, sought by respondents' cross-appeal, but not reached because of the court of appeals' affirmance, that hand-

CONCLUSION

For the reasons stated herein, the Court should affirm the judgment of the court of appeals. Alternatively, the Court should dismiss the writ of certiorari as improvidently granted because the record does not present the issues framed by petitioners.

Respectfully submitted,

JOSEPH M. HASSETT *
JOHN C. KEENEY, JR.
GEORGE H. MERNICK, III
DAVID G. LEITCH
ALBERT W. TURNBULL
GREGORY A. KALSCHEUR
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5643

* Counsel of Record

Counsel for Respondents

---

written notes of a meeting between FABI official Altman and the Bank's Chairman Drewer on the day before the stockholders' meeting (which were produced by the directors, but then reclaimed pursuant to a belated claim of privilege) were not subject to a valid claim of privilege. The notes at issue are found in the sealed appendix filed in the Fourth Circuit. Information contained in the notes, and to be obtained through inquiry based on the notes, is highly pertinent to causation and other issues as outlined by respondents in the court of appeals. There are other issues not yet passed upon by the court of appeals. *See* Pet. 16a n.3.